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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 DARKPULSE, INC.,

4 Plaintiff,

5 v.

21 CV 11222

6 FIRSTFIRE GLOBAL OPPORTUNITIES  
7 FUND, LLC, et al,

Injunction

8 Defendant.

-----x

9 New York, N.Y.  
10 January 21, 2022  
2:00 p.m.

11 Before:

12 HON. EDGARDO RAMOS,

13 District Judge

14 APPEARANCES

15 THE BASILE LAW FIRM P.C.  
Attorneys for Plaintiff  
16 BY: GUSTAVE P. PASSANANTE  
ERIC BENZENBERG

17 KIRKLAND & ELLIS LLP  
18 Attorneys for Defendants  
19 BY: AARON H. MARKS  
TRACY LIN  
20 JULIA DEVEREUX HARPER

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(Case called)

DEPUTY CLERK: Counsel, please state your name for the record.

MR. PASSANANTE: Gustave Passanante for the plaintiff.

MR. BENZENBERG: Eric Benzenberg, your Honor, the Basile Law Firm.

MR. MARKS: Good afternoon, your Honor. Aaron Marks, Tracy Lin, and Julia Harper from Kirkland Ellis, for the defendants.

THE COURT: Good afternoon to you all.

This matters is on for a preliminary injunction hearing. I have received the parties' papers, and I'm ready to hear you. If you speak from the table, you don't have to stand. If you want to use the podium, if that makes you more comfortable, you can use the podium. Just please bring the microphone as close to you as possible.

And Mr. Passanante or Mr. Benzenberg?

MR. PASSANANTE: It will be Mr. Passanante, your Honor.

THE COURT: Okay.

MR. PASSANANTE: So, your Honor, this case is about an unregistered dealer engaging in the business's security transactions.

The first point I want to make is the objections that the defendants made to the amendment of the note and the

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1 venue -- forum selection clause. The plaintiff's asserting  
2 that since the -- on the face of the note, it's criminally  
3 usurious based on the stated interest rate, the original issued  
4 discount, as well as the commitment shares issue. It brings in  
5 over the usury limitation of 25 percent in the State of  
6 New York, deeming the note criminally usurious.

7 THE COURT: I'm sorry. Can you slow down, please?

8 MR. PASSANANTE: Yes.

9 THE COURT: And I apologize. We all have to wear  
10 masks, but if you speak up a little bit, slow down, speak up a  
11 little bit, bring the microphone closer.

12 MR. PASSANANTE: So because of the stated interest in  
13 the note as well as the origination discount and the commitment  
14 shares that were issued -- the value of which, by the way, were  
15 approximately \$1.4 million -- that easily exceeds the  
16 25 percent interest cap that the State of New York provides for  
17 in the penal law, deemed the note criminally usurious and void  
18 *ab initio*. Since that note is void *ab initio*, that would mean  
19 that all ancillary documents, as far as the amendment goes, as  
20 well as the forum selection clause, would also be void.

21 THE COURT: When did you determine that this was  
22 usurious?

23 MR. PASSANANTE: You can tell by the terms of the  
24 note, your Honor, because of the stated interest rate and the  
25 original issue discount, which is about -- around 10 percent of

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1 the principal. However, when you analyze, it actually  
2 increases to 15 percent because the nine-month maturity on the  
3 note as well as the commitment shares were issued.

4 THE COURT: So it was usurious at the time it was  
5 entered into?

6 MR. PASSANANTE: Correct, your Honor.

7 THE COURT: And why didn't your client know that?

8 MR. PASSANANTE: Well, your Honor, my client is not an  
9 attorney, and it's an emerging growth corporation. They are  
10 traded on OTC markets. They are typically desperate for  
11 capital infusions, especially at the stage that they're in.

12 THE COURT: Did your client have a lawyer?

13 MR. PASSANANTE: Excuse me?

14 THE COURT: Did your client have a lawyer?

15 MR. PASSANANTE: Not sure, your Honor. I'm only  
16 litigation counsel.

17 THE COURT: What?

18 MR. PASSANANTE: You're saying at the time they  
19 entered the transaction?

20 THE COURT: Yes.

21 MR. PASSANANTE: Did they have an attorney? They had  
22 general counsel. As far as determining the usurious nature,  
23 though, I don't think that was a concern -- a concern for them  
24 at the time, because they were desperate for capital. And  
25 since they -- since the defendant was willing to provide

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1 capital, they were more interested in doing that. And then  
2 when the client determined that how --

3 THE COURT: I'm sorry. You really have to slow down.

4 MR. PASSANANTE: I'm sorry.

5 Once my client was able to determine how offensive  
6 some of the provisions in the note, were was when they sought  
7 counsel to determine the lawfulness of the note, which then  
8 when we reviewed it, determined that it was usurious as well as  
9 the other potential violations that defendants engaged in.

10 THE COURT: I'm sorry. So when, exactly, did your  
11 client determine that it was usurious?

12 MR. PASSANANTE: Your Honor, I don't think my client  
13 determined that it was usurious. I think counsel determined it  
14 was usurious, litigation counsel.

15 THE COURT: When?

16 MR. PASSANANTE: When? When we were able to review  
17 the note. The reason it wasn't inserted in our opening brief,  
18 your Honor, because -- the point that you posed to me -- is  
19 that corporations can't assert usury as an affirmative claim,  
20 so we can only raise it as a defense. The corporation can only  
21 raise it as a defense. So it's really just in response to  
22 defendant's argument as to the forum selection clause.

23 THE COURT: Okay.

24 MR. PASSANANTE: So that's why it wasn't raised until  
25 now, your Honor.

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1 THE COURT: Now, how long has your client been around?

2 MR. PASSANANTE: How long have they been around?

3 THE COURT: DarkPulse.

4 MR. PASSANANTE: As a publicly traded company?

5 THE COURT: Yes, sir.

6 MR. PASSANANTE: Three years, but there were private  
7 before that for about seven.

8 THE COURT: I know they engaged in a similar  
9 transaction with FirstFire in 2018, correct?

10 MR. PASSANANTE: Correct.

11 THE COURT: Were they desperate for cash then?

12 MR. PASSANANTE: Yes, they were, your Honor.

13 THE COURT: Have they been desperate for cash since or  
14 throughout?

15 MR. PASSANANTE: Yes, your Honor. So they're a tech  
16 company.

17 THE COURT: What do they do?

18 MR. PASSANANTE: They -- they create software or  
19 hardware, rather, called BODTA, brillouin optical -- optilian,  
20 something, something, technology. Essentially, what it does is  
21 it produces a dark pulse sensor, which can be inserted in  
22 mines, and what it will do is it will send out a dark pulse to  
23 read for any weaknesses in structures, any cracks in pipes, or  
24 anything like that. So they try and sell their software -- or  
25 hardware, rather, to mines, gold mines, oil mines, and things

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1 like that. That's where their technology is used.

2 THE COURT: And there's at least two with FirstFire,  
3 correct?

4 MR. PASSANANTE: Correct.

5 THE COURT: And they have engaged in similar  
6 transactions with other entities, correct?

7 MR. PASSANANTE: They have, your Honor.

8 THE COURT: How many more?

9 MR. PASSANANTE: I think it's approximately 12.

10 THE COURT: Approximately 12?

11 MR. PASSANANTE: Yeah.

12 THE COURT: And I think you've brought at least one  
13 other lawsuit here, correct?

14 MR. PASSANANTE: We're in litigation -- DarkPulse is  
15 in litigation in Southern District. I think they're a  
16 defendant in the Southern District, but they're a plaintiff in  
17 the Eastern District.

18 THE COURT: Don't you have a case before  
19 Judge Schofield?

20 MR. PASSANANTE: Yes, your Honor. In front of  
21 Judge Schofield as well. You're right.

22 THE COURT: And then you're engaged in other  
23 litigations?

24 MR. PASSANANTE: Yeah.

25 THE COURT: When did these litigations begin?

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1 MR. PASSANANTE: Roughly around the same time, your  
2 Honor, within the last couple of months.

3 MR. BENZENBERG: The Carebourn litigation, your Honor,  
4 is the earliest. It started approximately one year ago now.

5 THE COURT: One year ago?

6 MR. BENZENBERG: Yes.

7 THE COURT: And did you bring the same causes of  
8 action in that litigation as this one?

9 MR. BENZENBERG: No. Carebourn brought that action in  
10 the State Court of Minnesota, and we've been there since --  
11 we've been asserting defenses in that case, and we're currently  
12 in discovery as of the moment.

13 THE COURT: Okay. So you needed cash, and so you  
14 entered into a number of these transactions with entities like  
15 FirstFire, et cetera. Now, these are all multimillion dollar  
16 transactions, correct?

17 MR. PASSANANTE: Not always, your Honor. For example,  
18 I think the first note with FirstFire was roughly \$250,000.

19 THE COURT: With FirstFire?

20 MR. PASSANANTE: Yes. The September 2018 note. It  
21 was for roughly around that much. I am not sure if, actually,  
22 any of them are over a million. I think they're generally a  
23 couple hundred thousand dollars in principal.

24 THE COURT: Okay. Go ahead.

25 MR. PASSANANTE: Okay. And so to move on to the

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1 elements to meet for a preliminary injunction, your Honor, the  
2 plaintiff believes that they're likely to succeed on the merits  
3 based on only the transactions available on EDGAR, which are  
4 public documents -- public record.

5 And I note that plaintiff understands that those are  
6 only disclosures regarding the purchase of notes; however,  
7 they -- plaintiff did make the allegations as to the selling  
8 activity of the defendants, as also evidenced in their  
9 affidavits that they provided in support of their opposition,  
10 so --

11 THE COURT: What am I to make of the fact they have  
12 been converting your stock?

13 MR. PASSANANTE: Excuse me?

14 THE COURT: What am I to make of the pattern, if any,  
15 in terms of their conversion of your stock?

16 MR. PASSANANTE: Well, your Honor, if a person is in  
17 the business -- engages in the business of buying and selling  
18 securities, they are deemed a dealer under the Exchange Act,  
19 under section 3(a)(5). Generally, when you're in the business  
20 of buying and selling securities, it means that you're engaged  
21 in more than just a few isolated transactions.

22 What we do know is that the defendants in this action  
23 had engaged in dozens and dozens of these transactions, that we  
24 can tell, as of disclosures on EDGAR made by other issuers.  
25 And just in our cases, we do know that they engaged in the

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1 conversion of that debt into stock, and then do sell that  
2 common stock into the market.

3 So all of those securities transactions are certainly  
4 more than a few isolated transactions, and we believe in  
5 discovery, we would be able to obtain the selling records from  
6 the brokers of the defendants.

7 THE COURT: Isn't that published information.

8 MR. PASSANANTE: No, your Honor. Not selling records.

9 THE COURT: Okay.

10 MR. PASSANANTE: But the disclosures, of course, are  
11 public record, which, while it does evidence a lot of  
12 transactions, it could also be missing transactions because,  
13 remember, those disclosures are on behalf of the issuers, so  
14 some issuers don't make proper disclosures. So in discovery,  
15 there's likely to -- we're likely to find even more  
16 transactions that are evidenced on EDGAR.

17 THE COURT: What do you mean some issuers don't make  
18 proper disclosures?

19 MR. PASSANANTE: So some public companies, they might  
20 not disclose necessarily the entity name. They might be not  
21 reporting under the Exchange Act, which would -- obviously,  
22 they'd suffer consequences from the SEC and from the markets  
23 themselves, and could suffer a delisting. But it's not  
24 uncommon for -- especially if a company trades on the OTC  
25 markets, to file either incomplete disclosures or just not file

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1 disclosures at all and not make proper -- not meet the proper  
2 reporting requirements.

3 THE COURT: So you're asking me to speculate that  
4 FirstFire may have improperly failed to disclose certain of its  
5 transactions?

6 MR. PASSANANTE: Well, no, your Honor. So FirstFire  
7 wouldn't be the company disclosing it. It would be the issuer.  
8 So, for example, let's say there's ABC Corp., and FirstFire has  
9 a note with ABC Corp. and ABC Corp. is a publicly traded  
10 company.

11 THE COURT: Slow down.

12 MR. PASSANANTE: Sorry.

13 ABC Corp. would then be required to file in the  
14 disclosure -- whether it being 8-K or a 10-Q or a 10-K, stating  
15 the transaction that it entered into was FirstFire. So we  
16 wouldn't find the disclosures by FirstFire. We'd -- it would  
17 be evidenced by disclosure of other companies traded on the OTC  
18 markets, which are subject to those reporting requirements by  
19 the SEC. And so I'm not asking you to speculate, as I think  
20 that there's plenty of evidence on EDGAR as of today. We  
21 attached the transaction list from all the evidence that we  
22 found regarding transactions with FirstFire as an exhibit to  
23 the complaint.

24 THE COURT: Sorry. Ms. Rivera, can you close the  
25 curtains so we don't blind Mr. Benzenberg, please?

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1 MR. BENZENBERG: Thank you, your Honor.

2 THE COURT: That's fine.

3 MR. PASSANANTE: So, your Honor, back to my point.

4 I'm not asking the Court to speculate that FirstFire is engaged  
5 in these transactions.

6 THE COURT: But you're suggesting that there may be  
7 some wrongdoing somewhere along the line?

8 MR. PASSANANTE: Not necessarily wrongdoing. What I'm  
9 trying to purport is that there could potentially be even more  
10 transactions out there that are not public record.

11 THE COURT: Well, what's wrong with the transactions  
12 that they've engaged in that we know about?

13 MR. PASSANANTE: So the transactions that they've  
14 engaged in are securities transactions themselves. So the  
15 purchase of the note -- the note's defined as a security under  
16 the Exchange Act. So the securities purchase agreement sets  
17 forth the terms for the parties -- for FirstFire in this  
18 case -- to purchase the note from DarkPulse. So that agreement  
19 itself is a securities transaction, so that's why the plaintiff  
20 takes the position that the agreement itself -- in this case,  
21 the note, which is sold through the securities purchase  
22 agreement -- is itself, indeed, a securities transaction.

23 THE COURT: Okay.

24 MR. PASSANANTE: Right? On top of that, the --  
25 there's significant evidence in our case already that FirstFire

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1 acts as an underwriter, because they acquire the securities  
2 with an intent to redistribute. They make profits off of the  
3 markups because they acquire the securities at a substantial  
4 discount to market and then quickly sell after the conversion;  
5 that conversion either being a market-adjustable discount to  
6 conversion or being a fixed discount, which would still leave  
7 them in the money, so to say, similar to an option contract.  
8 So they're still acquiring stock at a discount to market, and  
9 then they will quickly resell that stock into the market to  
10 reap the benefit of the markup.

11 THE COURT: Can I just ask you a question? Putting  
12 aside whether or not this initial agreement is legal or not, is  
13 what you just described allowed for under the agreement?

14 MR. PASSANANTE: Is it allowed for under the  
15 agreement? Yes, your Honor.

16 THE COURT: Go ahead.

17 MR. PASSANANTE: Okay. And just to bring to the  
18 Court's attention there are two cases that were decided in the  
19 Southern District that were mentioned in our papers; the *LG* and  
20 the *Vystar* cases.

21 THE COURT: The *LG* and the *Vystar*?

22 MR. PASSANANTE: *Vystar*, yeah. Those were two  
23 Southern District cases that focused on the performance under  
24 the agreements.

25 While sometimes that may be a proper analysis for a

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1 court to engage in for a section 15(a) violation; in this case,  
2 it isn't, only because, as we stated before, the acquisition of  
3 the note itself from the defendant is, indeed, a securities  
4 transaction, as opposed to, for example, the cases that  
5 defendants cite in their brief, the *Frati* and the *Foundation*  
6 *Venture* cases. Those were service agreements that contemplated  
7 further securities transactions.

8 THE COURT: But in the *LG* and *Vystar*, was the same  
9 argument made?

10 MR. PASSANANTE: No, your Honor. So the argument made  
11 in those cases were that the agreements were unlawful because  
12 of the performance due under the agreements, which would  
13 further -- be further security transactions by an unregistered  
14 dealer. For some reason the court --

15 THE COURT: Is that what you're saying?

16 MR. PASSANANTE: No, your Honor. So under section  
17 29(b), it voids all agreements as made in violation under the  
18 Exchange Act. And so like I was saying earlier, these  
19 convertible notes are purchased through a securities purchase  
20 agreement. That securities purchase agreement itself is a  
21 transaction in securities. So the position the plaintiff is  
22 taking is that the initial transaction -- the acquisition of  
23 that note by the defendant -- is in fact, a securities  
24 transaction, which is why the entire note would be void.

25 THE COURT: Okay.

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1 MR. PASSANANTE: Okay. And as a public securities  
2 issuer, DarkPulse is within the class of persons that the act  
3 was designed to protect. And to touch on the --

4 THE COURT: What is the class of persons the act is  
5 designed to protect? How is it defined in that section?

6 MR. PASSANANTE: Since DarkPulse is an issuer of  
7 securities, the act is designed to protect issuers of  
8 securities, especially with the dealer registration requirement  
9 because of the restrictions and disclosure requirements it  
10 imposes on broker dealers.

11 To touch on the unwilling or innocent party argument  
12 that defendants brought up in their brief, I just wanted to  
13 clarify that that applies only to violaters of the act. And  
14 for a person to be an unwilling or innocent party, they would  
15 have to assist in the violation of the act.

16 DarkPulse didn't assist in -- assist in the defendants  
17 engaging in securities transactions and buying and selling  
18 securities as a part of their business. So since DarkPulse  
19 didn't assist in that violation --

20 THE COURT: I guess I don't understand that argument.  
21 This is a bilateral agreement, and to the extent that DarkPulse  
22 was desperate for cash, why can't that be seen as assisting in  
23 this transaction?

24 MR. PASSANANTE: Well, I wouldn't take that position,  
25 your Honor. I wouldn't take that position because they, for

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1 example, in the *Buffalo Forge* case, there was --

2 THE COURT: The Buffalo?

3 MR. PASSANANTE: *Buffalo Forge* case. That party was  
4 essentially on both sides of the transaction, assisting in  
5 deals and finding other agreements, which would be -- and then  
6 they attempted to terminate the note -- or I'm sorry, void the  
7 transaction. Since they were assisting in it, then they would  
8 be considered unwilling or innocent party -- I'm sorry, not  
9 considered, because of the activity that they were engaging in,  
10 because they were assisting in the violations of the act.

11 Moving on to the irreparable harm argument. It's been  
12 demonstrated that excessive selling activity and the erosion of  
13 the stock price is irreparable because it would affect the  
14 economic viability of a company. It's something that's not  
15 remedial by money damages. You can't restore market  
16 confidence, you can't restore certain --

17 THE COURT: Why would market confidence be damaged by  
18 FirstFire converting its debt? As I understand it, from  
19 defendant's papers, while their stake in DarkPulse may not be  
20 insignificant, it is small. And as they tell it, even when  
21 they're trading on a daily basis, the stock that they traded is  
22 a small percentage of the overall stock that's traded on any  
23 given day.

24 MR. PASSANANTE: Well, your Honor, yeah, that was in  
25 the affidavit that the defendants brought in support of its

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1 papers. However, they do still write currently -- as long as  
2 the affidavit was accurate, over 90 million shares of the  
3 DarkPulse stock. So if they were to dump, let's say, all of  
4 that stock in one day, that would probably amount to a volume  
5 significantly more than their average trading volume.

6 THE COURT: If they were to do that.

7 MR. PASSANANTE: If they were to do that.

8 THE COURT: Why would they do that?

9 MR. PASSANANTE: Well, your Honor, since they  
10 converted at such a substantial discount to market, they would  
11 still technically profit from any sales regardless of how much  
12 the stock price does decline.

13 THE COURT: Isn't it in their interest for your stock  
14 to be as valuable as possible?

15 MR. PASSANANTE: It is, your Honor. But there's no --  
16 since they did acquire it at such a steep discount, it's not  
17 like they would make no money -- of course, they would make  
18 less money, as you're suggesting, but they do have the  
19 opportunity to do that, and the opportunity to do that alone  
20 would -- if they were to put those many sell orders on a stock  
21 trade at this volume, then it would --

22 THE COURT: Well, let me ask you this, because we're  
23 not exactly working on a blank slate here, right? There's a  
24 prior agreement. And we didn't see FirstFire engage in that  
25 type of reckless trading that you're suggesting might happen

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1 here, right? They converted that stock over a period of months  
2 or maybe even a couple years. So why are you asking me now to  
3 assume that they're going to dump all this stock precipitously,  
4 and damages – and even assuming that creates larger than a  
5 ripple, given the amount of stock that your company trades on  
6 any given day?

7 MR. PASSANANTE: Well, certainly, your Honor. The  
8 reason why this got brought to our attention is because on  
9 January 14th -- I think it was last Friday when plaintiff  
10 originally filed its order to show cause for temporary  
11 restraining order -- we got notified from our client that there  
12 was a massive sell order for DarkPulse stock, and the defendant  
13 was one of the only parties that had the ability to put in an  
14 order that large, which was why the plaintiff took the position  
15 that they might do this again, that the defendants might put in  
16 a significant sell order again that could potentially damage  
17 the shares.

18 THE COURT: Was that part of the papers you put in  
19 last week?

20 MR. PASSANANTE: It was part of the first affidavit by  
21 Dennis O'Leary.

22 THE COURT: Did FirstFire put in a massive sell order  
23 on that day?

24 MR. PASSANANTE: Well, FirstFire rebutted that with an  
25 affidavit from Eli Firearm, which stated how many shares that

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1 that they sold. But the reason that the plaintiff originally  
2 believed it was the defendants was because of the sell order  
3 that the O'Leary affidavit speaks about. I believe it was  
4 January 14th.

5 THE COURT: Have you confirmed it was them?

6 MR. PASSANANTE: Well, your Honor, we were discussing  
7 before, we can't see the parties. It's not public information,  
8 who is selling and buying.

9 THE COURT: Okay.

10 MR. PASSANANTE: You can just see the volume.

11 THE COURT: By the way, can I ask another question?  
12 Generally speaking, when a party comes to court to request a  
13 TRO or preliminary injunction, the party is required to state  
14 that no similar application has been made before, and you  
15 didn't. I assume there's not. But I learned, I guess from the  
16 defense, that they had actually started an action in Delaware a  
17 couple weeks before you brought your action. That was not  
18 mentioned in your papers. Should it have been?

19 MR. PASSANANTE: Well, your Honor, so since the  
20 plaintiff takes the position that the agreements are void  
21 *ab initio*, the Delaware action, according to the plaintiff's  
22 position, was improper. That's why the plaintiffs didn't feel  
23 the need to mention the Delaware action, because it takes the  
24 position that it was improper.

25 THE COURT: So it doesn't exist?

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1 MR. PASSANANTE: Well, no, not that it doesn't exist,  
2 your Honor. It was just that we felt -- the plaintiff felt  
3 that jurisdiction was improper here because of the usurious  
4 nature of the contract, and that amendment would be void. And  
5 the same argument is most likely going to be made in the  
6 Delaware action. And the Delaware action also was only seeking  
7 a declaratory judgment; it wasn't to enforce the terms of the  
8 note.

9 THE COURT: No. Well, I mean, tomayto, tomahto.  
10 Again, as I said, it's not that you were required under the  
11 rule to tell me about that action. My only question is should  
12 you have. Would that have then contributed to the quantum of  
13 information that would have assisted me in analyzing your  
14 papers? But go ahead.

15 MR. PASSANANTE: I apologize, your Honor. Maybe we  
16 should have.

17 As to the balance of hardships between the parties,  
18 the relief that the defendants could potentially be entitled to  
19 is certainly calculable, which, during the pendency of this  
20 action, they wouldn't suffer any harm if they were to be  
21 prevented from selling any DarkPulse stock on the market  
22 because if, let's say, the market conditions increased, that  
23 would be calculated into damages and they missed an opportunity  
24 to sell that stock at a certain time, then it would be easily  
25 quantifiable, and they could obtain a money judgment against

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1 the plaintiff if they were to be successful on the merits of  
2 this action.

3 Lastly, your Honor, of course the plaintiff is willing  
4 to post a bond in the amount of whatever the Court would  
5 request, pending the disposition of this action.

6 And that's all I have to say, your Honor.

7 THE COURT: Very well. Thank you.

8 Mr. Marks, will you be arguing on behalf of FirstFire?

9 MR. MARKS: I will. I just want to make sure you can  
10 hear me.

11 THE COURT: I can hear you.

12 MR. MARKS: Okay. Thank you.

13 Your Honor, as set out in our papers, we believe there  
14 are several reasons why DarkPulse's motion for preliminary  
15 injunction should be denied. As your Honor pointed out in the  
16 first instance, we believe that this motion and DarkPulse's  
17 claims related to the April 2021 note do not belong before this  
18 Court.

19 We agreed in an amendment to the note that the  
20 exclusive forum provision would be for the state and federal  
21 courts in Delaware. This dispute first arose in November when  
22 FirstFire converted the note to shares, the parties went back  
23 and forth after DarkPulse requested two-thirds of the share's  
24 back. And on December 13th, we filed a declaratory action in  
25 the chancery court of Delaware, seeking a judgment that the

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1 conversion was proper and that FirstFire is entitled to keep  
2 all of the shares it converted.

3 DarkPulse, through Delaware counsel, has entered an  
4 appearance there, and we have a scheduling order in place now  
5 for briefing on initial dispositive motions.

6 THE COURT: They haven't answered?

7 MR. MARKS: What's that?

8 THE COURT: They didn't answer?

9 MR. MARKS: Not yet. Their answer is not due yet.

10 THE COURT: Right.

11 MR. MARKS: DarkPulse provides no viable reason for  
12 nullifying the forum selection clause agreed upon in the  
13 amendment and why the claims concerning the April 2021 note  
14 should be heard by this Court.

15 First, in their complaint, DarkPulse suggested that  
16 the amendment's contents were not explained to their CEO by my  
17 client before DarkPulse, the CEO, executed the amendment.  
18 That, of course, is not an excuse for a sophisticated party to  
19 void a contract or a contractual provision.

20 THE COURT: But wasn't there some suggestion in I  
21 think your paper that, in fact, Mr. O'Leary, if that's his  
22 name, did consult with counsel?

23 MR. MARKS: He did. He did. So, yes, it's our  
24 contention that the amendment should obviously be enforced;  
25 that Mr. O'Leary consulted with counsel; that Mr. O'Leary, as

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1 the CEO of DarkPulse, was more than capable of understanding  
2 the one-page amendment that only really spoke to the governing  
3 law provision and the choice of forum provision. So we  
4 think --

5 THE COURT: So the amendment spoke not only to forum  
6 but also to the choice of law?

7 MR. MARKS: Correct.

8 THE COURT: Okay.

9 MR. MARKS: In their papers, for the first time last  
10 night, DarkPulse now claims that the note was criminally  
11 usurious, and that somehow that is a basis for voiding the  
12 forum selection clause. There are several layers of reasons  
13 why this argument is completely unsound.

14 First of all what they don't address, again, is that  
15 Delaware law applies here and not New York law, not New York  
16 usury statutes. In fact, Judge Buchwald, in a similar case,  
17 *EMA Financial v. NFusz*, 444 F.Supp.3d 530, spoke to whether the  
18 parties agreed-upon choice of law -- in that case it was  
19 Nevada -- should be ignored because of the New York usury  
20 statute, and Judge Buchwald found that the public policy behind  
21 the New York usury statute was not fundamental to warrant  
22 overriding the parties' choice of law in order to ensure the  
23 usury statute's enforcement. Judge Buchwald could not conclude  
24 that enforcing the parties' choice of law provision would be  
25 truly obnoxious to New York public policy.

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1           So they state no reason why we should even look to the  
2 New York's usury statute in assessing the choice of forum  
3 provision. However, even if they could state a reason from  
4 looking at the New York usury statute, it really does not  
5 matter because, here, it is obvious that even if the New York  
6 statute applied, it is plain that the note at issue here is not  
7 criminally usurious. On its face, this note has a 10 percent  
8 interest rate, it has a 10 percent OID, original issue  
9 discount, even annualized -- DarkPulse acknowledges in their  
10 papers last night that, on its face, the interest rate and the  
11 OID adds up to less than 25 percent, which is the limit.

12           THE COURT: As I understand it, it's a fixed rate in  
13 connection with this agreement?

14           MR. MARKS: Correct, your Honor. Correct. So I think  
15 what you're referring to is the conversion mechanism, and that  
16 is a fixed rate, and there is good reason why one does not then  
17 account for the conversion rate in figuring out whether the  
18 instrument is usurious or not.

19           And, in fact, DarkPulse did not even suggest that the  
20 conversion mechanism here goes into the calculation of usury.  
21 What they did suggest, just before when Mr. Passanante was  
22 arguing -- what they did suggest was that on top of the  
23 interest rate and the original issue discount, that this Court  
24 should also add value that of the shares that were reserved for  
25 conversion at the time of entering the note to determine usury.

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1 Okay?

2 When the note was entered in April 2021, the company  
3 reserved, whatever it was, 177 million or more shares in the  
4 event that six months or more later there would be a  
5 conversion. They're suggesting that in determining usury, that  
6 these shares, which may never be touched, should be taken into  
7 the calculation of whether something is usurious. That is  
8 flatly wrong, and your Honor actually rejected that very same  
9 argument in a 2019 decision that your Honor wrote in the case  
10 *EMA Financial v. AIM Exploration*.

11 Your Honor cited several Southern District decisions  
12 that held, "The reservation of shares is not an independent  
13 payment to the lender, but merely a mechanism by which to  
14 effectuate the share conversion as envisioned by the note and  
15 the SPA. Since the share conversion feature does not render  
16 the agreement usurious, neither does the reservation of shares  
17 provision." And you can conclude in that decision, did hear  
18 the note, did not require the share reserve to be paid to the  
19 plaintiff. It was simply security that the defendants were  
20 required to set aside so that there would be shares available  
21 if the conversion option was exercised.

22 THE COURT: So is it the case, Mr. Marks, that if the  
23 reserve shares are counted, it may be usurious, but if they're  
24 not counted, they are not usurious?

25 MR. MARKS: That's correct. Meaning that what they

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1 did in their papers from last night, as you'll see, they value  
2 their reserve shares at the time that we contracted, right, you  
3 know, however 177 million shares were worth \$1.4 million on  
4 April 21 -- or April 26 when we entered this contract, and  
5 they're saying you add that to your calculation, and that puts  
6 you over the usury line. Okay? But there's no decision, yours  
7 or the several decisions cited in the Southern District, that  
8 you cite that would require that. In fact, they all reject it.

9 So this argument that this note was usurious, and then  
10 for that to be a reason to void the forum selection clause is  
11 completely speechless. There's no basis for it whatsoever.

12 So, your Honor, the motion should be denied outright  
13 for being brought in the wrong forum.

14 THE COURT: Can I ask you a question about that note,  
15 Mr. Marks?

16 MR. MARKS: Sure.

17 THE COURT: My understanding is that there is a  
18 New York Court of Appeals decision from last fall.

19 MR. MARKS: Yes.

20 THE COURT: Which essentially, I think, tells us that  
21 we all, here in the Southern District, got it wrong.

22 MR. MARKS: Yes.

23 THE COURT: Was that the reason for the amendment; if  
24 you can tell me?

25 MR. MARKS: Your Honor, the timing -- look, I was not

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1 involved with the amendment. Timing would suggest that there's  
2 a connection there; however, something that's important to  
3 understand is that that decision, the *Ader Bays* decision by the  
4 Court of Appeals, really has no application to this note, and  
5 that's because of the following:

6 What the *Ader Bays* decision determined was that if a  
7 note had a variable or floating conversion rate, meaning that  
8 at the time of conversion, six months, eight months after the  
9 note is entered, let's say the stock has gone up or the stock  
10 has gone down -- the way that a variable or floating rate  
11 conversion note works is that, let's say there's \$100,000 in  
12 outstanding balance, the way the conversion would work under a  
13 variable rate note, which is typical, is you'd be able to  
14 convert at the then-market rate at the time of conversion,  
15 minus like a 30 or 35 percent discount. That's typical for one  
16 of these notes.

17 And what the *Ader Bays* court, what the Court of  
18 Appeals said, is that if the noteholder is guaranteed a  
19 discount off-of-the-market rate, they are not subject really to  
20 market risk of the stock, meaning if the stock goes down here  
21 from April to November when we converted, under a variable rate  
22 note, our conversion price would drop with the market and go  
23 30 percent lower so that it would never be in trouble. Okay?

24 Our note is different because we don't have a variable  
25 rate. We don't have a variable rate conversion rate. We have

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1 a fixed conversion rate here, meaning we agreed that on  
2 April 26th, our conversion rate, under normal circumstances,  
3 would be 15 cents or .15 cents, whatever it is, per share. And  
4 it was going to stay that regardless. It was fixed. So if the  
5 stock went down significantly and the company tanked, our  
6 conversion rate stayed the same. We weren't entitled to  
7 convert to a lower number with the market and a discount from  
8 there.

9 What *Ader Bays* said is this variable rate or floating  
10 rate note, notwithstanding the fact it might be tough to  
11 calculate what that's worth, but that should be added to a  
12 calculation for usury. They distinguished that from this note,  
13 right, which is a fixed rate note. So the *Ader Bays* decision  
14 is really inapplicable to this case.

15 Now, you asked did we get the amendment because of the  
16 *Ader Bays* decision. The timing, I agree, was very close in  
17 time, but the *Ader Bays* decision really has nothing to do with  
18 this case. Okay?

19 So for the reasons I just stated, we believe strongly  
20 that the motion should be denied because it was brought in the  
21 wrong forum. Delaware is the proper place.

22 As to if your Honor reaches the preliminary injunction  
23 motion itself, we think that on the merits of it, it also would  
24 have to be denied as it fails every single prong.

25 First, they don't come close to satisfying the

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1 requirement of irreparable harm here. DarkPulse asserts that  
2 it will be irreparably harmed if we sell into the market. What  
3 was 177 million shares is now half of that. First of all, you  
4 know, obviously, they were late in bringing this motion.  
5 Seven weeks and 42 trading days past. Whatever urgency they  
6 had, whatever they saw in the market that they thought we were  
7 doing something, we weren't. And whatever urgency they suggest  
8 there was from 177 million shares, obviously, is at least half  
9 of that now.

10 First, and obviously, we're talking about shares of  
11 stock here. DarkPulse common shares are heavily traded in the  
12 open market. Monday, Tuesday, Wednesday of this week alone,  
13 260 million shares of DarkPulse traded. 85 million shares a  
14 day this week. And my client has little, if any, of that.

15 THE COURT: But there's something, isn't there,  
16 Mr. Marks, to the point that if you were to dump the balance of  
17 the DarkPulse shares that you have on Monday, notwithstanding  
18 the fact that there are however many billion shares outstanding  
19 in circulation, that might have a negative impact on it,  
20 wouldn't it?

21 MR. MARKS: Your Honor, at this point it's less than  
22 2 percent of the DarkPulse shares out there. It's less than  
23 what was traded on each of the three days this week. It's  
24 totally speculative as to what impact our selling would have.

25 THE COURT: I take it that the 85 million shares that

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1 were sold on average over the last three days were multiples of  
2 different traders, correct, or different holders?

3 MR. MARKS: I mean, that's not public information.

4 THE COURT: All right.

5 MR. MARKS: And let me add this: It may or may not be  
6 because last month in December, DarkPulse struck another deal  
7 with a different financing source, right, where they gave --  
8 this is a firm GHS. We mentioned this in our papers. They  
9 offered to GHS 300 million new shares. Okay? So GHS is  
10 unlikely holding onto these shares. GHS is likely a party that  
11 is out there selling their shares. There are no restrictions  
12 on them whatsoever.

13 THE COURT: What are the terms of that agreement; if  
14 you know?

15 MR. MARKS: It's a finance agreement. It's not a  
16 convertible note. It's a different type of instrument.

17 THE COURT: Okay.

18 MR. MARKS: But the point is that they're looking to  
19 limit us from selling 85 million shares. They just gave  
20 another investor completely uninhibited 300 million shares, and  
21 they're not asking that entity to slow down their trade.

22 Your Honor, again, that where an injunction is sought  
23 regarding common shares of stock, and such shares are available  
24 on the open market, there is no reason why monetary damages  
25 would not adequately compensate the plaintiff if it proved up

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1 its case.

2 This notion, as we just talked about, about  
3 dilution -- again, I understand it's a hypothetical that if  
4 somebody trades a lot of shares in one day, but DarkPulse has  
5 done nothing to quantify that, to suggest that a sale of 80 or  
6 90 million shares, which my client has not done -- you know, to  
7 date, we've only sold in small pieces -- that that would make  
8 up less than 2 percent of the market, where this company has  
9 issued 300 million to somebody else last month, where they've  
10 issued 3.5 billion shares to convertible noteholders over the  
11 past three years, 3.5 billion shares -- that this 80 or  
12 90 million shares is somehow going to make some sort of  
13 difference here. It just doesn't make sense.

14 THE COURT: How many different holders did they issue  
15 up to?

16 MR. MARKS: I think it's in our papers that they have  
17 done 20 different notes, they've done 36 conversions. I think  
18 it's seven or eight different investment funds that they've  
19 converted with. And it's been massive amounts of shares.

20 THE COURT: So 3.5 billion over 20 different notes?

21 MR. MARKS: Yes.

22 THE COURT: Okay.

23 MR. MARKS: Right. So I mean, again, there's now 5, 5  
24 and a half billion shares out there. Three and a half billion  
25 of them are issued to the investment funds that they've done

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1 these deals with.

2 So, your Honor, there's no irreparable harm here. I  
3 can quickly address likelihood of success on merits if you'd  
4 like me to.

5 THE COURT: Is your client an unregistered securities  
6 dealer?

7 MR. MARKS: They are not a dealer, they are not  
8 registered, but they are not in the business of buying and  
9 selling securities as defined under the Securities and Exchange  
10 Act. You know, first, there are several prongs of 29(b) that  
11 are in no way satisfied here. First, the note issue is not an  
12 unlawful transaction under the securities law.

13 THE COURT: Is it a security?

14 MR. MARKS: It's not a security at all. It's funny  
15 that when they're claiming that it's usurious, DarkPulse  
16 characterizes the note as a loan; when not discussing usury,  
17 it's now somehow a security. It's not a security.

18 And Judge Carter's decision in *Vystar* is really  
19 squarely on point. Judge Carter then granted summary judgment  
20 in favor of EMA Financial on plaintiff's 29(b) claims because  
21 nothing in the note or the SPA explicitly required  
22 EMA Financial, the noteholder, to act as a broker-dealer. The  
23 note was capable of being performed, even if EMA or, here,  
24 FirstFire, did not register as a dealer.

25 FirstFire is not required under the note to sell or

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1 buy securities. Notes were neither made nor performed in  
2 violation of any federal securities laws required for decision  
3 under section 29(b).

4 Judge Carter dismissed the Vystar's 29(b) filing on  
5 this basis. He also, by the way, found that rule 15(a)(1)  
6 provides no private right of action. Those are two reasons  
7 right there in Judge Carter's opinion why there's no likelihood  
8 of success on the merits.

9 But there are more reasons. Your Honor just asked  
10 about the business of buying and selling securities. DarkPulse  
11 would have to prove under 29(b) that FirstFire is irregularly  
12 engaged in the business of buying and selling securities as a  
13 dealer. There is no basis for suggesting that the trader  
14 exception that is built into this determination of whether an  
15 entity would be a dealer, the exception for being a trader  
16 trading on its own account; this exemption should apply to  
17 FirstFire.

18 As far as whether they're in the regular business of  
19 buying and selling securities, one example proving otherwise,  
20 comes from DarkPulse's own complaint. DarkPulse has alleged  
21 that out of \$34 million in principal, right, loaned by  
22 FirstFire for all of its convertible notes that DarkPulse found  
23 on EDGAR, FirstFire converted only on \$1.4 million of that  
24 known amount, or 4 percent of the total amount loaned.

25 So with respect to the other \$32.6 million of loans

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1 made, those were all paid back by the companies they loaned to  
2 in cash, right? They were straight up loan-type transactions.  
3 The six months passed or however many months passed. Rather  
4 than converting for shares, the companies paid back, there was  
5 \$700,000 in cash, plus the interest. There was no securities  
6 involved whatsoever.

7 DarkPulse also said in their papers that FirstFire  
8 effectuated no fewer than 203 securities transactions with  
9 other small companies like DarkPulse; yet the EDGAR list shows  
10 only about 30 conversions and 13 share issuances.

11 DarkPulse does not have a reasonable likelihood based  
12 on this data of demonstrating that FirstFire is in the business  
13 of buying and selling securities, which is a plain requirement  
14 obviously for 29(b).

15 Last element here: DarkPulse will not be able to show  
16 that it is in the class of entities intend to be protected by  
17 the Exchange Act. As set out in our brief, precedent requires  
18 a party to be an unwilling and innocent party to a transaction  
19 that purportedly violated 29(b).

20 Here, based on DarkPulse's track record of entering  
21 dozens of these convertible notes, based on the fact that this  
22 note, in particular, acknowledged that FirstFire was not a  
23 registered dealer; the fact there's a covenant in the SPA that  
24 DarkPulse would never assert before any person or governmental  
25 authority that it was entitled to relief based on the fact that

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1 FirstFire was an unregistered dealer; the fact that DarkPulse  
2 is and was plaintiff in lawsuits seeking to void contracts with  
3 investment funds like this that were not registered before it  
4 entered into this note --

5 THE COURT: Sorry. What are the dates of those  
6 actions that you're referring to?

7 MR. MARKS: So Mr. Benzenberg referred to the  
8 *Carebourn* action. For example, that action was brought by  
9 Carebourne in advance of -- you know, over a year ago.  
10 Carebourne is the plaintiff there pursuing the shares. It  
11 didn't receive the shares. They didn't convert. DarkPulse  
12 prevented them from converting. And DarkPulse is defending  
13 that action saying that Carebourn was an unregistered dealer,  
14 and that predates this note.

15 THE COURT: Okay.

16 MR. MARKS: Okay? All these things point to  
17 overwhelmingly that DarkPulse was no babe in the woods when it  
18 came to this dealer issue. They were well aware.

19 THE COURT: Let me ask you this: The counsel for  
20 DarkPulse says that this was a company that was continually  
21 desperate for money, desperate for cash. Assuming that your  
22 client knew that, would that change the analysis as to whether  
23 they were, in fact, a willing participant in this transaction?

24 MR. MARKS: No. Because, your Honor, there's no  
25 question that DarkPulse knew what it was signing up for. They

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1 had counsel for each of these notes. They were aware of this  
2 unregistered dealer issue. There's nothing unlawful about the  
3 transaction that's been entered into. And, again, this is just  
4 one of the several prongs of 29(b), the notion that DarkPulse  
5 needs to be an unwilling and innocent party. It would be  
6 different if they were coming at this for the first time, but  
7 there is nobody more sophisticated than DarkPulse about these  
8 convertible notes. They've done 20 of them. They've been  
9 converted to the tune of 3.5 billion shares. They've brought  
10 all sorts of lawsuits about them. They've hired here, and  
11 they've hired them several times, the law firm that represents  
12 all these small-cap companies in these cases.

13 So we believe that that element, that they would not  
14 have a reasonable likelihood of success on these several  
15 elements under 29(b), including this element.

16 Just to conclude, we don't think your Honor needs to  
17 even reach the likelihood of success on the merits of this  
18 injunction. We think, in the first instance, that this belongs  
19 in Delaware, where the preexisting case in chancery court  
20 regarding this note is going forward.

21 But if we were to reach the merits, we think that it  
22 fails under irreparable harm as well as the likelihood of  
23 success on the merits.

24 THE COURT: Thank you. Mr. Passanante, I'll give you  
25 an opportunity to respond briefly.

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1 MR. PASSANANTE: Sure, your Honor. Thank you.

2 Just one thing I wanted to clarify that Mr. Marks  
3 said. When he was referring to the usurious nature of the  
4 contract and arguing that the reserve shares were not included  
5 in the calculations, he was absolutely correct.

6 What he's incorrect about were the shares that we're  
7 alleging that did count in the calculation, which were the  
8 75 million commitment shares that were issued upon execution of  
9 the note. That was what was valued at \$1.4 million. The  
10 reserve shares are what the transfer agent holds in reserve.  
11 So the commitment shares is what Mr. Marks was supposed to be  
12 referring to, because those were issued upon execution of the  
13 note. The reserve shares that he was discussing have to do  
14 with an obligation under the notes that require the company to  
15 put shares in reserve. Those shares in reserve are held by the  
16 transfer agent, the trust account, which will then be  
17 transferred to the lender upon a request for a conversion.

18 Those shares are held in reserve to ensure that the  
19 lender can actually obtain shares upon conversion. So he's  
20 correct; they're not conveyed, and they should not be  
21 calculated at value; however, the 75 million shares that were  
22 conveyed upon execution should be considered value --

23 THE COURT: So did you include the reserve shares in  
24 your calculation in determining the usurious nature of the  
25 contract?

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1 MR. PASSANANTE: Yes, your Honor. With the stated  
2 interest rate on top of the OID, that amounts to roughly  
3 25 percent. The value of the stock that they acquired upon  
4 execution was roughly \$1.4 million.

5 THE COURT: Again, I'm just trying to get this one  
6 little point clear in my mind. Mr. Marks said that you  
7 included the reserve shares in your calculation, and my  
8 question to you is, did you?

9 MR. PASSANANTE: No, your Honor. So what we included  
10 was the commitment shares.

11 THE COURT: Okay.

12 MR. PASSANANTE: The shares that were actually  
13 conveyed upon execution. Reserve shares were not conveyed upon  
14 execution. They were held, like I said, by the transfer agent.

15 THE COURT: You didn't include them in your  
16 calculation?

17 MR. PASSANANTE: No, your Honor. Because they  
18 didn't --

19 THE COURT: Go ahead.

20 MR. PASSANANTE: And that property under *Sabella*,  
21 which was decided in the Southern District, a case we mentioned  
22 in our papers, the value of those shares given as consideration  
23 are absolutely considered as interest. And regardless of how  
24 those shares are valued, because understandably, they were  
25 likely restricted, which would have probably at least a slight

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1 reduction in value at the time of conveyance as to the market  
2 price, regardless even a fraction of a percent would take it  
3 under -- over the lawful interest rate, making the entire loan  
4 void *ab initio*.

5 THE COURT: Okay.

6 MR. PASSANANTE: And with respect to Ader Bays,  
7 another clarification, what the Court said was --

8 THE COURT: With respect to what?

9 MR. PASSANANTE: Ader Bays, the Court of Appeals  
10 decision decided last fall.

11 THE COURT: Okay.

12 MR. PASSANANTE: That wasn't mentioned in our papers  
13 regarding at least the conversion discount to the applied  
14 interest, but if it were, there's certainly a way to value that  
15 conversion option.

16 As the Court in that case stated, as the Court of  
17 Appeals stated, there is a factually intensive analysis to  
18 determine the value of the conversion option at the time of  
19 execution. And it's specifically laid out two methods that it  
20 would suggest courts to engage in; either Black-Scholes  
21 analysis, the way that options and warrants are valued, or  
22 binomial lattice evaluation.

23 THE COURT: A binomial?

24 MR. PASSANANTE: Binomial lattice. Please don't ask  
25 me to explain it.

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1 THE COURT: All right.

2 MR. PASSANANTE: But it's a valuation procedure that  
3 would occur at the -- by a financial expert that would consider  
4 obviously volatility, among other things, to determine how much  
5 that conversion option is valued. But I want to just state  
6 that that is not necessary here. Because of commitment shares,  
7 the stated interest and the original issue discount would  
8 easily take us past that 25 percent threshold.

9 And, your Honor, as to the note being a security -- a  
10 note is defined as a security under the Exchange Act. So  
11 there's really no argument to that effect, saying that it is  
12 not a security. And it is, indeed, also a loan, obviously,  
13 because it's money in exchange for a repayment of that debt  
14 whether it be by cash or -- sorry.

15 THE COURT: So if it is a security, is it subject to  
16 usury analysis?

17 MR. PASSANANTE: Well, it's a loan as well, your  
18 Honor. So a loan is subject to a usury analysis, but a note is  
19 a security under the Exchange Act.

20 MR. BENZENBERG: Your Honor, if I may. The  
21 Exchange Act definition section when it defines security, it  
22 states stock, note, warrant, option, and lists several other  
23 types of financial instruments. Additionally, New York usury  
24 laws applies to any loan or forbearance of money. The note  
25 would constitute a forbearance of money, and in that regard,

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1 must comply with New York usury laws.

2 MR. PASSANANTE: And just to speak to the effect of  
3 the defendant's reliance on the trader exemption, your Honor.  
4 It's important to point out that the defendants do not acquire  
5 shares on the open market like a trader would. They do not  
6 make money based on the appreciation of the stock that they  
7 acquire, because they make it based off of the markup from the  
8 conversions that they -- that they are entitled to under the  
9 notes that they enter into. Traders do not do that. Traders  
10 engage in a few isolated transactions, and aren't acquiring  
11 securities with the view towards distributing those same  
12 securities.

13 THE COURT: I'm sorry. I didn't understand that last  
14 part. Can you go through that again?

15 MR. PASSANANTE: Yes. So the defendants argue that  
16 they fall into the trader exemption. The trader exemption is  
17 essentially for people like me or you who would engage in  
18 purchasing stocks with an e-trade account or some other kind of  
19 brokerage account. If me or you were to acquire those shares,  
20 we would acquire them and hope for them to increase in value,  
21 and then hope to make money on the gain of that profit. As  
22 opposed to an underwriter or a dealer, who acquires those  
23 securities with a view towards distribution. The reason they  
24 can act in that manner is because they acquire them at a  
25 discount to the market price.

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1 THE COURT: So it's as if they have no interest in the  
2 value of the security going up?

3 MR. PASSANANTE: Well, I wouldn't say that they don't  
4 have any interest in the value of securities going up, but I  
5 would say that they do not need the value of the securities to  
6 go up because they'll always make money because they'll always  
7 be in the money based on the conversion discount. So they'll  
8 always acquire under market, whether it be a --

9 THE COURT: Well, it's under market today, right?  
10 Isn't it always going to be to under market?

11 MR. PASSANANTE: Generally, yeah. They will draft the  
12 agreements to always be under market, whether it be with a  
13 fixed discount or with an adjustable discount. Even though it  
14 has a fixed discount, they'll usually have a default provision  
15 so they can convert a fraction of the stated fixed interest --  
16 fixed conversion rate.

17 THE COURT: But that doesn't mean that they would  
18 never have an interest in having them value the stock over  
19 market?

20 MR. PASSANANTE: Correct, yeah. And as to the  
21 unwilling or innocent party discussion, the fact that DarkPulse  
22 was simply a party to these transactions does not mean that  
23 they assisted in violations.

24 Like you brought up, they were an emerging growth  
25 company, they were desperate for capital, and simply by

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1 engaging in these tractions does not by any means mean they  
2 were assisting in the violations that the unregistered  
3 securities dealers were.

4 And that would be all from me, your Honor.

5 THE COURT: Okay. Mr. Marks, anything?

6 MR. MARKS: Just to correct one thing about the trader  
7 exception.

8 What Mr. Passanante was referring to when saying that  
9 we received these shares at a discount, okay, he's referring to  
10 a variable rate note that I described before, where there's a  
11 built in 30 percent discount off of the market. Here, there  
12 was a fixed rate at 15 cents, you know, 15 cents or .015 per  
13 share. Okay? There was market risk. Okay? That is not  
14 Ader Bays. That is not a riskless transaction where we're  
15 always going to be below the market when we convert. So that  
16 is not the sign of a dealer. That fits squarely within the  
17 trader exception.

18 Otherwise, I rest on my prior arguments and papers.

19 THE COURT: Very well. So let's take a 5-, 10-minutes  
20 break. Don't go far.

21 (Recess)

22 THE COURT: Okay. The injunction will not issue.

23 First, I find that defendants are correct that the  
24 forum selection clause is presumptively enforceable, and thus  
25 this action is not properly before this Court. The forum

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1 selection clause is presumptively enforceable if: One, it was  
2 reasonably communicated to the party resisting enforcement;  
3 two, the clause is mandatory and not merely permissive; and  
4 three, covers the claims and parties involved in this suit.  
5 Citing *Phillips v. Audio Active Ltd.*, 494 F.3d 378 (2d Cir.  
6 2007). Here, the defendants have put forth evidence that the  
7 November 2021 amendment was communicated to DarkPulse's CEO,  
8 Mr. O'Leary, who signed it. DarkPulse cannot reasonably  
9 contest that the forum selection clause was communicated to it,  
10 because it was contained in the agreement signed by  
11 Mr. O'Leary, who, as CEO of the company, was sufficiently  
12 sophisticated to understand it.

13 Moreover, there's evidence in the record that he also  
14 had the advice of counsel at the time that he signed it.

15 Here, citing *H.A.L. NY Holdings v. Guinan*, reported at  
16 2018 WL 5869648, a Southern District case from 2018. By its  
17 terms, the forum selection clause is mandatory and covers this  
18 action, and there's no evidence on the record before me that  
19 the enforcement would be unreasonable or unjust, nor that the  
20 clause is invalid.

21 While that may be sufficient for the denial of the  
22 motion, I find that even if the forum selection clause did not  
23 apply, I would deny the motion for preliminary injunction. In  
24 deciding whether to enter a preliminary injunction, I must  
25 consider four factors: One, where the plaintiff is likely to

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1 succeeds on the merits; two, whether they are likely to suffer  
2 irreparable harm in the absence of preliminary relief; three,  
3 the balance of hardships, or equities; and four, whether an  
4 injunction is in the public interest, citing *Benihana, Inc. v.*  
5 *Benihana of Tokyo*, 784 F.3d 887 of 2015, Second Circuit case.

6 Plaintiffs has not shown that they are likely to  
7 succeed on the merits of their claims. In fact, plaintiff's  
8 theory that the April 2021 note is invalid under section 29(b)  
9 of the Securities Exchange Act because FirstFire was acting as  
10 an unregistered broker dealer has already been rejected by two  
11 courts in this district. See *LG Cap Funding, LLC v. ExeLED*  
12 *Holdings*, reported at 2018 WL 6547160, a Southern District case  
13 from 2018, and *EMA Financial, LLC v. Vystar Corp.*, reported at  
14 2021 WL 1177801, a 2021 Southern District case, reconsideration  
15 denied. And that was reported at 2021 WL 5998411. The no  
16 broker-dealer representation clause in the April 2021 agreement  
17 also undercuts plaintiff's claims.

18 Furthermore, plaintiff has not established that they  
19 will suffer irreparable harm in the absence of an injunction.  
20 All plaintiff argues at section 29(b) must not provide for  
21 damages, the only remedy is rescission. Courts in this district  
22 have found that monetary damages are an adequate remedy for  
23 stock on the market. See, for example, *Alpha Cap Anstalt v.*  
24 *Shiftpixy*, reported at 432 F.Supp. 326 of 2020, Southern  
25 District case, and *Union Capital, LLC v. Vape Holdings*,

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1 reported at 2017 WL 1406278 of 2017, Southern District case.

2 I find that the time period between FirstFire's  
3 conversion of the note and the initiation of this action  
4 further undercuts a finding of irreparable harm. In addition  
5 plaintiff placed a great deal of emphasis on the fact that  
6 defendant was apparently reporting to dump, if you will, its  
7 remaining stock on the market. Nothing in the record in the  
8 history of the transactions between the relationships between  
9 these two parties suggests that will be the case.

10 As to the third and fourth factors, I do not find that  
11 plaintiff has demonstrated that the balance of hardship  
12 strongly favors it or that the public interest would be  
13 disserved by denial of the instant motion.

14 The record shows that FirstFire owns a very small  
15 percentage of DarkPulse stock, approximately 5 percent, and so  
16 it is unlikely that selling this stock could cause the  
17 reputational damage that DarkPulse fears. In fact, FirstFire  
18 has put forth the argument that it could be harmed if I  
19 enjoined it from selling the stock it converted pursuant to the  
20 note.

21 Finally, while the registration requirement under  
22 section 15(a) does serve public interest, I do not find that  
23 this necessarily applies to the parties' transactions, given  
24 the provisions of their contract, executed between two  
25 sophisticated entities who had previously entered into a

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1 similar contract.

2 That constitutes the opinion of the Court.

3 How do the parties wish to proceed, Mr. Marks?

4 MR. MARKS: Well, your Honor, we have until  
5 March 13th -- I'm sorry, your Honor.

6 THE COURT: You don't to have to apologize.

7 MR. MARKS: As far as proceeding goes, our response to  
8 the complaint is due, you know, like March 13th. We were just  
9 served January 13th. I imagine we'll probably be filing a  
10 three-page letter before your Honor pursuant to your rules  
11 seeking leave to file a dispositive motion.

12 THE COURT: Very well. Anything further that I should  
13 do today, Mr. Passanante?

14 MR. PASSANANTE: No, your Honor.

15 THE COURT: Mr. Marks?

16 MR. MARKS: No, thank you, your Honor.

17 THE COURT: Then we're adjourned. I want to thank the  
18 parties for your arguments today. They were quite helpful.

19 (Adjourned)  
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